IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1715 OF 2002

Bank of Maharashtra ...Appellant
Vs.
M/s. Dasp Engineering & Ors. ...Respondents

Mr N.J. Devashrayee for the Appellant.
None for the Respondents.

CORAM : A. S. OKA, J.
DATE : MARCH 28, 2006.

P.C.:

1. By order dated 05th December, 2002 notice was ordered to be issued to the Respondents. By the said order it was directed that parties be put to the notice that matter will be finally heard and disposed of at the stage of admission. The office noting shows that the Respondents are duly served with the notice. The Respondent No.2 is represented by an Advocate. None appears for any of the Respondents.

2. The Appellant-Bank of Maharashtra is the original plaintiff. The Appellant-Bank filed a suit for recovery of sum of Rs.06,69,946.08 with interest thereon at the rate of Rs.21 per cent per annum. The original Defendant Nos.2 and 3 filed separate written statements raising various defences.

3. The Trial Court framed following seven issues:

1. Whether the suit is within limitation?

2. Does Defendant No.2 proved that Defendant Nos.4 and 6 have been mis-joined in the suit?

3. Does Defendant No.2 prove that he repaid the entire loan amount, but plaintiff instituted this suit by charging wrong interest?

4. Do Defendant Nos.2 and 3 prove that they are entitled for suitable instalments?

5. Do Defendant Nos.2 and 3 prove that plaintiff has charged more interest than what was agreed?

6. Is plaintiff entitled to suit amount?

7. What order and decree?

The Trial Court dismissed the suit by recording following findings on the issues:

Issue No.1	No.
Issue No.2	No.
Issue No.3	Yes.
Issue No.4	No.
Issue No.5	Yes.
Issue No.6	No.
Issue No.7	Suit dismissed.

3. The learned Counsel appearing for the Appellant submitted that the Trial Court has not at all decided any of the issues on merits. He submitted that the suit has been dismissed on the ground that the Appellant-Bank has not complied with order directing the Appellant-Bank to produce certain documents. He submitted that the Trial Court has proceeded on erroneous basis by observing that provisions of Rule 11 Order 39 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code) are mandatory. He submitted that facts of the case of the Appellant have not been considered at all

by the Trial Court.

4. I have considered the submissions. The Trial Court has noted that an Application was made by the Defendant No.2 at Exhibit 65 calling upon the Appellant-Plaintiff to produce certain documents. On the said Application an order was passed by the Trial Court directing the Appellant-Plaintiff to produce documents at serial No.4,5,7, 9 and 11 listed in the said Application at Exhibit 65. Again an Application was moved at Exhibit 71 by original Defendant seeking direction of the Trial Court to compel the Appellant-Plaintiff to produce the documents. In the said Application a prayer was made for dismissal of the suit. The learned Judge has noted in the judgment that in the meanwhile certain documents were produced by the Appellant by making an Application at Exhibit 80. The said documents were filed alongwith list Exhibit 81. The contention of the Defendants in response to the said Application was that all the documents as directed by the Trial Court were not produced. The Trial Court has observed that the Appellant-Bank failed to produce documents at serial

Nos.7, 9 and 11 as mentioned in list Exhibit 65.

5. Perusal of the impugned Judgment shows that the reason for dismissing the suit are confined to paragraph Nos.11 and 12 thereof. Without referring to the oral evidence of the witnesses examined by the Appellants, the learned Judge seems to have jumped to the conclusion that the Appellant-Plaintiff has not proved the entries made in the extract of account. It is pertinent to note that the Trial Court has not at all referred to the evidence led by the Appellant-Plaintiff. It appears that the Trial Court was oblivious of the provisions of the Bankers Book Evidence Act, 1891. In paragraph No.12 of the Judgment, the Trial Court has held that the provision of Rule 11 Order 39 of the said Code are mandatory in nature and there is no discretion left with the court. The said view expressed by the Trial Court is contrary to the view taken by a Division Bench of this Court. This court has held that provision of Rule 11 Order 39 of the said Code are directory in nature.

6. There is no consideration of the oral evidence

led by the Appellants. Issue regarding limitation has been framed. Without there being any discussion in the Judgment on the said issue, the same is answered against the Appellant-Plaintiff.

7. In my view, the impugned Judgment deserves to be quashed and set aside as all the issues on facts and law are not at all answered by the Trial Court and evidence is not at all considered and appreciated. It is desirable that the suit should be remanded to the Trial Court.

8. Hence, I pass the following order:

(i) The impugned Judgment and Decree dated 05th October, 2001 is quashed and set aside.

(ii) Special Civil Suit No.226 of 1992 is restored to the file.

(iii) The Trial Court will permit the parties to lead further evidence, if any, both oral and documentary.

(iv) The Trial Court will decide the suit as expeditiously as possible in any event on or before 30th April, 2007.

(v) All contentions of the parties on merits are kept open.

(vi) Parties and concerned Court to act upon an authenticated copy of this order.

JUDGE